

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of |) | |
| |) | |
| Request for Review of the |) | CC Docket No. 02-6 |
| Decision of the Universal Service |) | |
| Administrative Company or, in the |) | |
| Alternative, Request for Waiver |) | |
| |) | |
| Federal-State Joint Board on |) | CC Docket No. 96-45 |
| Universal Service |) | |
| |) | |
| Schools and Libraries Universal Service |) | Charlotte County School District |
| Support Mechanism |) | FYs 2005, 2006 and 2007 |
| |) | Form 471 Application Nos. 463795, 498259, |
| |) | 560949 |
| |) | FRNs 1301495, 1400257, 1547566 |

**CHARLOTTE COUNTY SCHOOL DISTRICT REQUEST FOR REVIEW
OF DECISION BY THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY OR,
IN THE ALTERNATIVE, REQUEST FOR WAIVER**

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TABLE OF CONTENTS

| | PAGE |
|---|------|
| I. THE USAC DECISION | 4 |
| II. BACKGROUND | 5 |
| III. STANDARD OF REVIEW | 10 |
| IV. THE REQUEST FOR REVIEW | 12 |
| A. The USAC’s Expressed Basis for Rescission of the FY 2005, 2006 and 2007 FCDLs and Recovery of Disbursed Funds is Legally Insufficient. | 12 |
| B. Factual Information Regarding “Gifts, Meals, Gratuities or Entertainment” From the USAC’s FY 2008 Funding Commitment Request Denial. | 14 |
| C. The Commission Must Apply the Rules in Effect at the Time of the FCC Form 471 Filings or at the Time of the Expenses. | 15 |
| D. A Proper Application of the Rules and Policies in Effect in the FY 2005-2007 Timeframe Demonstrates That There Was No Violation of the Competitive Bidding Rules in This Case. | 20 |
| E. Facts Relevant to an Ad Hoc Determination. | 30 |
| 1. Amount of Expenses | 30 |
| 2. Timing..... | 31 |
| 3. Circumstances | 33 |
| V. ALTERNATIVE REQUEST FOR WAIVER..... | 40 |
| A. Neither the Commission’s Interest in a Fair and Open Bidding Process nor the Public’s Interest in Providing Funding for Advancing Technology in Schools will be Furthered by Enforcing USAC’s Determinations. | 40 |
| B. The Additional Factors of Hardship and Equity Also Support Waiver. | 43 |
| VI. CONCLUSION..... | 47 |

SUMMARY

The Charlotte County School District (the “District”)¹ is seeking Commission review and reversal of three USAC Notification Adjustment Letters (the “COMADs”) rescinding previously approved funding commitments for funding years (“FY”) 2005-2007 and stating USAC’s intention to recover \$611,032.37 in disbursed commitments. USAC’s determination is neither supported by the facts of this case nor consistent with the applicable law and must be reversed.

In December 2002, the District posted FCC Form 470 to acquire WAN and Internet services (“2002 Competitive Bidding Process”). Trillion Partners emerged as the lone bidder and was subsequently awarded a five-year, \$2,500,000 contract (the “2003 Contract”). From 2005-2007 the District posted three FCC Forms 471 requesting continuation funding related to the 2002 Competitive Bidding Process and the resulting 2003 Contract.² USAC approved each funding commitment, totaling \$709,966.80, and authorized disbursements of \$611,032.37. On February 9, 2011, USAC issued three COMADs rescinding the commitments and seeking recovery of the full \$611,032.37.

The lone basis stated by USAC for its rescission and recovery action is its determination that “prior to/throughout your contractual relationship with [Trillion], you were offered and accepted gifts, meals, gratuities, or entertainment from [Trillion], which resulted in a **competitive [bid] process** that was no longer fair and open.” (emphasis added) USAC’s determination is wholly insufficient, and provides a sufficient basis for reversal, because it identifies neither the relied-upon documents, the gifts or things of value that the District received from Trillion, nor any connection between any gift and the 2003 Contract bidding process.

¹ The formal name of the applicant is the School District of Charlotte County, Florida. However, since the USAC actions at issue refer to the applicant as the Charlotte County School District, this filing will also adopt that reference

² The approved funding commitments and disbursements for 2003 and 2004 are not at issue.

To the extent that USAC is referring to approximately \$500 in expenses Trillion paid on behalf of a District employee to attend and participate in educational conferences sponsored by Trillion from 2006-2008, USAC has erroneously classified the receipt of those expenses as a *per se* violation of the “fair and open” bidding process requirement without conducting the required *ad hoc* investigation into the timing, circumstances and amount of the expenses, and their relationship to, or effect on, the bidding process itself. In short, it is impossible that the receipt of conference-related expenses affected a competitive bidding process occurring three and one-half years earlier. Similarly, the educational purpose of the conferences, amount of the expenses and lack of any evidence that any District competitive bidding process was discussed demonstrate that the District has not violated the “fair and open” requirement.

USAC has required no connection between the presumed expenses and any bidding process and the lack of any Commission rules, case law or guidance on the subject in effect at the time of the 2002 competitive bidding process, the conferences or the filing of the Forms 471. It has used a new standard providing that any benefit received during a contractual relationship requires a *per se* determination that the bidding process itself was tainted. Under the applicable rules, however, the District held a fully-compliant, “fair and open” bidding process; it had no existing relationship with Trillion that would have unfairly influenced the process and did not provide Trillion with inside information. Simply put, there is no connection, identified or reasonably discernable, between the expenses in question and the bidding process for the 2003 Contract - from which the subject FY 2005-2007 funding commitment requests arose. For these reasons, the District respectfully requests that the Commission reverse the USAC’s COMADs.³

³ Alternatively, the District requests a waiver because enforcing the COMADs does not further the Commission’s interest in ensuring a “fair and open” bidding process, nor the public’s interest in advancing the technological capabilities of its public schools and will represent an inequitable and undue hardship on the District.

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**CHARLOTTE COUNTY SCHOOL DISTRICT REQUEST FOR REVIEW
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Pursuant to 47 C.F.R. §54.719(c), Charlotte County School District⁴ (the “District”), by its attorneys, herein seeks review and reversal by the Federal Communications Commission (the “Commission”) of three Notification Adjustment Letters, each dated February 9, 2011, (the “COMADs”) by the Schools & Libraries Division (the “SLD”) of the Universal Service Administrative Company (the “USAC”).⁵ The COMADs rescind funding commitments made to the District as long ago as five (5) years in response to Funding Request Number (“FRN”) 1301495, 1400257, 1547566, as identified in its Form 471 Application Numbers 463795, 498259

⁴ The Charlotte County School District consists of over 16,000 students and 2,000 teachers located on 19 K-12 campuses in a rural area of southwest Florida. Its mission is to “provide an innovative educational environment that allows and inspires success for everyone.” “Charlotte County Public Schools Fact Sheet,” <http://www.yourcharlotteschools.net/documents/media/2010QuickFacts.pdf>.

⁵ Copy attached as Exhibit A.

and 560949, and state that the SLD will seek recovery of any disbursed funds.⁶ The FRNs in question concern FY 2005, 2006 and 2007 requests to pay Trillion Partners, Inc. (“Trillion Partners”) for Wide Area Network (“WAN”) and Internet services provided to the District.⁷ The District respectfully requests that the Commission reverse the COMADs to the extent that they order the rescission of the portions of the Funding Commitment Decision Letters (“FCDLs”)⁸ that granted the referenced FRNs and seek recovery of those committed funds already disbursed to the District.⁹

I. THE USAC DECISION

In each of the three COMADs dated February 9, 2011, the USAC stated, in full:

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During the course of a review, documentation provided by you and/or your vendor indicated that there was not a fair and open competitive bid process free from conflicts of interest. The documents provided by you and/or your service provider indicated that, prior to/throughout your contractual relationship with the service provider listed on the FRN, you were offered and accepted gifts, meals, gratuities, or entertainment from the service provider, which resulted in a competitive process that was no longer fair and open. Therefore, the commitment has been rescinded in full and USAC will seek recovery of any disbursed funds from the applicant and service provider.¹⁰

In the COMADs, the SLD¹¹ rescinded \$709,966.80 in funding commitments made to the District as long ago as five (5) years in response to the subject FY 2005, 2006 and 2007 FRN requests and stated that it will seek recovery of \$611,032.37 in disbursed funds. However, the COMADs do not identify what “gifts, meals, gratuities, or entertainment” form the basis of the USAC’s

⁶ Copy attached as Exhibit B.

⁷ FY 2005 extends from July 1, 2005 through June 30, 2006. FY 2006 extends from July 1, 2006 through June 30, 2007. FY 2007 extends from July 1, 2007 through June 30, 2008.

⁸ The FCDLs in question were issued on February 8, 2006 for FY 2005, on December 6, 2006 for FY 2006 and on July 26, 2007 for FY 2007. Copies of the FCDLs are attached as Exhibit C.

⁹ Appended hereto as Attachment 1 is the Declaration of Christopher Bress attesting to the true and correct nature of the factual allegations made herein.

¹⁰ COMADs at 4

¹¹ Though the COMADs were from the SLD, this appeal will refer to USAC, as opposed to SLD, to avoid confusion.

denial and recovery action, when any such “gifts, meals, gratuities, or entertainment” occurred, the amounts of any such “gifts, meals, gratuities, or entertainment” or their relationship to a competitive bidding process. Moreover, as noted, FRNs 1301495, 1400257 and 1547566 are continuation funding requests for FY 2005, 2006 and 2007, made pursuant to the 2003 Contract which resulted from a competitive bidding process that was conducted in 2002. Even if the USAC used the same expenses that it identified in its denial of the District’s FRN 1672288 for FY 2008¹², those expenses were incurred more than three and one-half years after the 2002 competitive bidding process and could not have had any effect on that process.

As will be shown below, USAC’s explanation for the recovery and the denial is fatally flawed as a matter of law and substantively inadequate as a basis for a recovery order and a denial of the subject FY 2005, 2006 and 2007 funding requests. Moreover, the record does not support a denial and recovery order.

II. BACKGROUND

In 2002, Charlotte County, as an older community, did not have the buried infrastructure necessary to support the instructional goals of the District at a reasonable price. To get the communications speeds needed at a reasonable cost, the District made a cost-effective decision to establish a wireless infrastructure. On December 3, 2002, the District posted an FCC Form 470 (458640000438013) for WAN and Internet services to be provided during a five-year contract, commencing on July 1, 2003.¹³ A neutral and impartial competitive bidding process continued for 28 days and concluded on December 31, 2002 (the 2002 Competitive Bidding Process). The predecessor-in-interest to Trillion Partners was the only bidder, was selected as

¹² See Funding Commitment Decision Letter dated September 15, 2010 by the Schools and Libraries Division of the Universal Service Administrative Company which denied the District’s FY 2008, FRN 1672288, FCC Form No. 606829 (“September 15, 2010 FCDL”). Copy attached as Exhibit D.

¹³ Copy attached as Exhibit E.

the winning bidder and awarded the five-year contract through FY 2007, ending on June 30, 2008 (the “2003 Contract”). The value of the contract was approximately \$2,500,000.

The FRNs 1301495, 1400257 and 1547566 at issue in the COMADs are continuation funding requests for FY 2005, 2006 and 2007 made pursuant to the 2003 Contract.

On February 16, 2005, the District posted the relevant FCC Form 471 for FRN 1301495 in FY 2005. On February 8, 2006, the USAC issued an FCDL approving a funding commitment of \$244,414.80. On August 24, 2006, a disbursement of \$174,476.63 was authorized.

On February 10, 2006, the District posted the relevant FCC Form 471 for FRN 1400257 in FY 2006. On December 5, 2006, the USAC issued an FCDL with a funding commitment of \$232,776.00. On March 1, 2007, a disbursement of \$203,779.74 was authorized.

On February 7, 2007, the District posted the relevant FCC Form 471 for FRN 1547566 in FY 2007. On July 27, 2007, the USAC issued an FCDL with a funding commitment of \$232,776.00. On September 3, 2007, a disbursement of \$232,776.00 was authorized.

Therefore, disbursements for the FYs in question here had been authorized by USAC at least three (3) years and five (5) months before the February 9, 2011 COMADs.

During the term of the 2003 Contract, including FY 2005, 2006 and 2007, Trillion Partners provided valuable services to the District by installing considerable WAN infrastructure, including several antennas and 15 poles ranging from 85 feet to 140 feet. These poles were buried 20 feet into the ground and secured with cement. This was necessary to make sure they were safe enough to survive a hurricane. On August 14, 2004, Hurricane Charley came through the school district and although it destroyed six of the schools, all of the poles survived.¹⁴

The WAN provided by Trillion Partners is critical to the daily function of Charlotte

¹⁴ See <http://thejournal.com/articles/2007/09/01/disaster-recovery--courting-disaster.aspx>

County's Public Schools. The WAN serves as the main mode of distribution of the District's electronic instructional content including its United Streaming, Compass Learning, NetTrekker, and Internet Access programs, as well as Florida's Comprehensive Assessment Test materials and the preparation and delivery of end of course online tests to name a few. Without the ability to distribute this content throughout the district, the students would be put at a significant disadvantage. The network is also used to ensure the safety of the children. From the moment students are picked up in the morning the District records and monitors data from its transportation system to help make their trip to and from school safe and efficient. Once they arrive at school, the WAN allows the District to review video surveillance data from the various campuses in real time if there is a need to protect the students or review a past event. The WAN is then used during the day to track the data needed to arrange for efficient student access to the school cafeteria and other school buildings. Finally, the WAN is also used to track the student's attendance, discipline records, and grades.

The WAN is technically and metaphorically the backbone of communication in the Charlotte County School District. Simply put, the District would not be able to function without it and would not be able to afford it without the discounted pricing provided by the Schools and Libraries Program.

As the 2003 Contract that provided such valuable WAN services was coming to a close, the District posted a new FCC Form 470 (36708000062396) for the issuance of another five-year WAN and Internet services contract to be provided for FY 2008 through FY 2012 and commencing on July 1, 2008.¹⁵ The Form 470 was posted on November 6, 2007 - almost five

¹⁵ Copy attached as Exhibit F. Although the 2007 Competitive Bidding Process and the 2008 Contract have no relevance to the FY 2005, 2006 and 2007 funding requests at issue here, the District has included background information because the USAC previously made a similar legal determination with respect to the 2007 Competitive Bidding Process as it has here with respect to the 2002 Competitive Bidding Process.

years **after** the 2002 Competitive Bidding Process that governed the 2003 Contract and the subject FY 2005, 2006 and 2007 funding commitment requests. After the 28-day competitive bidding process ended on December 4, 2007 (the “2007 Competitive Bidding Process”), it was determined that Trillion Partners was again the only bidder. The District then evaluated and selected Trillion Partners as the winning bidder. On January 22, 2008, Trillion Partners was awarded a five-year \$2,500,000 contract, commencing on July 1, 2008 (the “2008 Contract”). Each February from 2008-2010, the District filed FCC Forms 471 seeking continuation funding related to the 2008 Contract.

In a letter dated June 4, 2010, the USAC informed the District that it proposed the denial of the District’s FY 2008 Form 471 application 606829 (FRN 167228), FY 2009 Form 471 application 656774 (FRN 1797577) and FY 2010 Form 471 application (FRN 1957503) (the “June 4 Letter”).¹⁶ Each of the identified FRNs concerned funding requests to pay Trillion Partners for WAN and Internet services provided to the District pursuant to the contract that resulted from the November 6, 2007 FCC Form 470.

In the June 4 Letter, the USAC stated the basis of its denials as follows:

Based on the documentation you have provided, the entire FRNs will be denied because you did not conduct a fair and open competitive bid process free from conflicts of interest. The documentation you provided indicates that you were offered and accepted valuable meals and entertainment immediately prior to and/or during the process you conducted to select a service [provider] to provide these goods and services from the service provider you selected. Charlotte County SD posted a Form 470 (36708000062936) on November 6, 2007 and awarded a contract in January, 2008 to Trillion Partners for multi-year WAN and Internet services. In 2007 and 2008 Trillion Partners sponsored a Customer Council conference known as VTEC. Mr. Bress attended the conference and Trillion Partners paid for Mr. Bress’ travel, meals, gratuities and accommodations. These items approximately total over \$500.00 for each year. Enclosed is a list of expenses paid by Trillion. In Charlotte County SD’s response to Mrs. Barbara Cannon, USAC, Mr. Bress discusses that he did receive lunch meals from Trillion Partners representatives (email dated June 25, 2009). These

¹⁶ Copy attached as Exhibit G.

meals and entertainment show that you engaged in non-competitive bidding practices in violation of program rules. Because the competitive bidding process was tainted by these actions, the establishing Form 470 for your Form 471 applications for FY2008, FY2009 and FY2010 are tainted.¹⁷

By letter dated June 23, 2010 (the “June 23 Letter”), the District disagreed and requested that the USAC reconsider its proposed denials.¹⁸

In the September 15, 2010 FCDL, the USAC **approved** all the FRNs previously proposed for denial in the June 4 Letter except for the District’s FY 2008 Form 471 application. As the basis for its denial, USAC stated:

This FRN is denied because the documents provided by you and/or your vendor indicate that there was not a fair and open competitive bid process free from conflicts of interest. The documentation provided by you and/or your service provider indicates that prior to/throughout your contractual relationship with the service provider listed on the FRN, that you were offered and accepted either gifts, meals, gratuities, entertainment from the service provider, WHICH resulted in a competitive process that was no longer fair and open and therefore funding is denied.¹⁹

On November 1, 2010, the District filed the “Charlotte County School District Request for Review of Decision By the Universal Service Administrative Company” with the Commission in which it requested reversal of the USAC’s denial of the District’s FY 2008 Form

¹⁷ June 4 Letter at p. 1. Mr. Bress is the Director of Learning Through Technology and Media for the Charlotte County School District. The conferences identified in the June 4 Letter are Visionaries in Technology Education Counsel (“VTEC”) conferences sponsored by Trillion Partners in 2006, 2007 and 2008 for its existing customers and were described by Trillion Partners in a letter to Mel Blackwell of USAC dated June 8, 2009, as:

educational conference[s] for existing Trillion customers after they were under contract with Trillion. This was a participant-driven conference focused on education-oriented best practices. The main goal was improving education and the application of technologies to achieve this goal. Guest speakers included nationally renowned speakers including a University professor and a learning technology expert, neither of whom were associated with Trillion. Each participant shared their thoughts in an open discussion forum on what they generally thought would shape education in the years to come.

Trillion Partners, Inc. Response to USAC and Appeal to FCC, dated June 21, 2010 (“Trillion Response/Appeal Letter”) at 2. A copy of the Trillion Response/Appeal Letter is attached as Exhibit H. These conferences are described in more detail in a later section.

¹⁸ Copy attached as Exhibit I. *See also*, Trillion Response/Appeal Letter.

¹⁹ Exhibit D, September 15, 2010 FCDL at 11 (emphasis in original).

471 application 606829 (FRN 1672288). That appeal remains pending and a copy remains on file with the Commission.

III. STANDARD OF REVIEW

In addressing a petition for review, the Commission must conduct a *de novo* review of any decision of the USAC Administrator and, unlike appellate review of FCC decisions, no deference is due to the USAC.²⁰ An aggrieved applicant may appeal to the FCC directly and an appeal to the USAC is not a prerequisite.²¹

The Commission has repeatedly stated that USAC is authorized only to act as an administrator of the Universal Service Fund program. Indeed, the rules caution that “the Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”²² Accordingly, in performing an investigation, USAC is not permitted to exercise discretion or resolve issues for which the rules are unclear. Rather, USAC’s sole function is to implement the rules and directives of the FCC.²³ Thus, because USAC has been given an extremely narrow delegation – one that involves no policymaking authority – its rulings do not have the force of law and are not afforded deference.²⁴ For that reason, the Commission is required to review the issues presented herein *de novo* and USAC’s underlying COMAD decisions should be given no weight.

²⁰ 47 C.F.R. §§ 54.719(c), 54.723(b).

²¹ 47 C.F.R. §§ 54.719(c), 54.722(a).

²² 47 C.F.R. § 54.702(c).

²³ The USAC may request guidance from the Commission but did not do so in connection with “gifts, meals, gratuities, entertainment.”

²⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001) (holding that *Chevron* deference does not apply where “there is no indication that Congress meant to delegate authority [to the agency to issue] rulings with the force of law”); *cj* Earl Bonfield, *StateAdministrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 Admin. L. Rev. 121, 134 (Spring 1990) (courts “need not give any deference to [agency interpretive rulemaking] because no discretion to create binding law on that subject was expressly or impliedly delegated to the agency”).

Further, this appeal requires the Commission to consider the merits of USAC's determinations, rather than merely verifying that USAC followed appropriate procedures. The Commission will not uphold a USAC decision, without review, just because USAC was found to be acting within its authority:

[W]e conclude that USAC decisions, whether considered by the Bureau or the Commission, should be subject to *de novo* review. Accordingly, we decline to adopt USAC's and SLC's recommendation that the Commission uphold USAC decisions without considering the merits of the appeal if the Commission finds that USAC has not exceeded its authority and has acted consistently with the Commission's rules.²⁵

Thus, it is not enough for the Commission to determine that USAC followed appropriate investigative processes or examined relevant information in connection with its issuance of the COMADs. Instead, the Commission must conduct its own evaluation of the information received by USAC from the District and Trillion, and must independently determine whether the factual record demonstrates that the 2002 Competitive Bidding Process was unfair and not open.

The USAC has a fundamental responsibility to deliver a reasoned decision in the first instance. In this case, however, the USAC has failed to do so and the Commission's acceptance of USAC's determinations would undermine the District's right to an appeal and due process.²⁶ As discussed herein, the USAC's COMADs are grossly deficient in both fact and law because USAC has failed to identify any specific factual support for its conclusions or provide legal support for the standards it chose to apply.

²⁵ *In re: Changes to the Board of Directors of the National Exchange Carrier Assoc., Inc.: Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, ~ 69 (1998).

²⁶ The Commission should note that the USAC did not require the availability of its factual record to the District. Indeed, the District was not served with any documents submitted by Trillion or any other person and thus had access only to the information that the District itself submitted to the USAC.

IV. THE REQUEST FOR REVIEW

A. The USAC's Expressed Basis for Rescission of the FY 2005, 2006 and 2007 FCDLs and Recovery of Disbursed Funds is Legally Insufficient.

In the COMADs, the USAC's entire explanation for ordering the recovery of previously disbursed funds and denying the funding commitments that are the subject of FRNs 1301495, 1400257 and 1547566 is limited to the following:

This FRN is denied because the documents provided by you and/or your vendor indicate that there was not a fair and open competitive bid process free from conflicts of interest. The documentation provided by you and/or your service provider indicates that prior to/throughout your contractual relationship with the service provider listed on the FRN, that you were offered and accepted either gifts, meals, gratuities, entertainment from the service provider, which resulted in a competitive process that was no longer fair and open and therefore funding is denied

No specific documentation is identified in the COMADs beyond a statement that it was provided by "you and/or your service provider." Nor do the COMADs explain how the content of the unidentified documents provided by "you and/or your service provider" "indicate that there was not a fair and open competitive bid process free from conflicts of interest."

Moreover, the USAC does not discuss the timing of the unidentified "gifts, meals, gratuities, entertainment from the service provider" relative to any competitive bidding process or the circumstances surrounding their provision. Nor does the USAC explain **how** the acceptance of the unidentified "gifts, meals, gratuities, or entertainment" from the service provider resulted in a competitive bidding process that was no longer fair and open in this particular case. Put another way, the USAC does not even attempt to link any "gifts, meals, gratuities, or entertainment" to a competitive bidding process.

Significantly, the USAC does not cite to any authority for its use of "prior to/throughout your contractual relationship" as the proper timeframe for consideration. In fact, the USAC

leaves wide open the time frame within which a violation of the “fair and open” competitive bidding requirement can be deemed to have occurred. For example, according to the USAC, so long as an applicant has a contractual relationship with a service provider, conduct occurring more than three years removed from a competitive bidding process can become the basis of a finding that the competitive bidding process was not “fair and open.” Even more startling, the USAC is apparently willing to automatically equate any “gifts, meals, gratuities, or entertainment” with such a violation, regardless of amount, timing or context, or whether the “gifts, meals, gratuities, or entertainment” are in any way related to the competitive bidding process as a factual matter. Notwithstanding the USAC’s statement that it conducted a “thorough investigation,” the COMADs present no evidence that the USAC has performed a fact-driven, *ad hoc* analysis that demonstrates the existence of any connection between any “gifts, meals, gratuities, or entertainment” and any competitive bidding process in this case. Indeed, the USAC ignores that for FY 2005, 2006 and 2007 the relevant time frame for consideration of whether a “fair and open” competitive bidding process has occurred is the competitive bidding process itself, commencing with the posting of an FCC Form 470 and concluding 28 days later with the selection of a successful bidder.²⁷

In short, the COMADs do not progress beyond an unsupported conclusion that **any** “gifts, meals, gratuities, or entertainment” from the service provider to the applicant during a contractual relationship **necessarily** taints a competitive bidding process. There is no analysis of the value of the “gifts, meals, gratuities, or entertainment,” when they were provided relative to the competitive bidding process, or the context in which they were provided.

All of this makes it difficult to address the COMADs because they provide no notice of the particular documents forming the basis of the recovery and denial and, without such

²⁷ See *infra*.

identification, the District cannot fully address its content nor the USAC's conclusions.²⁸ While the District submits that these flaws are sufficient to reverse the COMADs, there are multiple additional reasons, explained below, that compel a grant of this Request for Review with instructions to USAC to withdraw its COMADs.

B. Factual Information Regarding “Gifts, Meals, Gratuities or Entertainment” From the USAC’s FY 2008 Funding Commitment Request Denial.

As explained herein, the COMADS do not identify what “gifts, meals, gratuities, or entertainment” form the basis of the USAC’s denial and recovery action, when any such “gifts, meals, gratuities, or entertainment” occurred, the amounts of any such “gifts, meals, gratuities, or entertainment” or their relationship to a competitive bidding process. Thus, the District must guess as to what the USAC is referring. In previously addressing the District’s FY 2008 funding commitment request for WAN and Internet services to be provided by Trillion Partners pursuant to the 2007 Competitive Bidding Process and 2008 Contract, the USAC identified certain “gifts, meals, gratuities, or entertainment” expenses where Trillion Partners was also the vendor.²⁹ The District assumes these are the “gifts” referenced in the COMADs.

In its June 4 Letter, USAC referred to Trillion Partners’ Expense Summary and identified expenses it determined to be “gifts, gratuities, expenses and entertainment” sufficient to warrant

²⁸ This Request for Review seeks review and reversal of the COMADs which, as stated, are lacking in the identification of a specific factual basis or a linkage between any such factual basis and a competitive bidding process. To the extent the Commission considers extra record material identified in the June 4th Letter that preceded the September 15, 2010 FCDL, it is unclear how the USAC traveled from its June 4 Letter to its September 15, 2010 FCDL and what documentation identified in the June 4 Letter actually forms a basis for the September 15, 2010 FCDL. This compounds the lack of identified factual basis in the COMADs because while the June 4 Letter proposed the denial of multiple FRNs for multiple FYs, the September 15, 2010 FCDL denies only one FRN in one FY. The remainder of the denials proposed in the June 4 Letter were not effectuated and the associated funding requests were approved in other FCDLs.

²⁹ See June 4 Letter. While these expenses were mentioned in the June 4 Letter, the USAC did not identify any expenses in its September 15, 2010 FCDL in which it denied the District’s FY 2008 funding commitment request. As noted, the September 15, 2010 FCDL was appealed by the District on November 1, 2010.

denial of the District's FY 2008 funding request.³⁰ Specifically, Trillion's Expense Summary identified:

(a) in 2006, there was \$487.58 in "gifts, gratuities, expenses and entertainment" of which \$427.20 was for expenses associated with a VTEC conference held on July 27-28, 2006.³¹

(b) in 2007, there was \$638.14 in "gifts, gratuities, expenses and entertainment" of which \$627.82 was for expenses associated a VTEC conference held on August 9-10, 2007.³²

(c) in 2008, there was \$536.53 in "gifts, gratuities, expenses and entertainment" of which all was for expenses associated with a VTEC conference held on June 24-25, 2008.

As explained herein, neither the amount nor timing of these expenses relative to any competitive bidding process support the USAC's conclusion in the instant case.

C. The Commission Must Apply the Rules in Effect at the Time of the FCC Form 471 Filings or at the Time of the Expenses.

The FCC and USAC must use the rules in effect at the time of the filing of the FCC Form 471 application(s) in question.³³ The USAC itself has stated publicly that it "does not base findings on rules that were not in effect during the relevant time period."³⁴ It has also declared that "[i]f a program beneficiary believes that a finding resulting in a commitment adjustment or

³⁰ The June 4 Letter identified Trillion Partners-sponsored customer conferences, a Trillion Partners Expense Summary provided by Trillion Partners and a June 25, 2009 email from Mr. Bress to Ms. Barbara Cannon of USAC relating to certain lunch expenses.

³¹ The remaining \$60.39 relates to expenses associated with a speaking engagement by and two business lunches with Mr. Bress of the District.

³² The remaining \$10.32 relates to expenses associated with a business lunch with Mr. Bress.

³³ *See, e.g.*, Long Beach Unified District, File No. SLD-367394, CC Docket No. 02-6, Order, DA 07-2695 (WCB rel. June 20, 2007); Long Beach Unified District, File No. SLD-367370, et al., CC Docket No. 02-6, Order, DA 07-2695 (WCB rel. March 13, 2007); Friendship House, File No. SLD-314307, CC Docket No. 02-6, Order, DA 06-2462 (WCB rel. December 4, 2006); and Academia Discipulos de Cristo, File No. SLD-358081, 358083, et al., CC Docket No. 02-6, Order, DA 06-1642 (WCB rel. August 15, 2006); Keyport School District, 24 Rcd 12702, CC Docket 02-6, (TAPD rel. October 20, 2009); and Cook Telecom, Inc., 24 FCC Rcd 7611 (TAPD June 3, 2009), all of which granted appeals of a USAC decision based on Petitioner's compliance with the rules in effect at the time of Petitioner's initial filing.

³⁴ Reply Comments of the Universal Service Administrative Company, Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, WC Docket No. 05-195, et seq, December 19, 2005 at 85.

recovery is not based on a rule in effect at the time, the beneficiary can appeal the USAC's commitment adjustment or recovery consistent with the Commission's rules."³⁵

The FCC Form 471s in question here were filed on February 16, 2005 (FY2005), February 10, 2006 (FY2006) and February 7, 2007 (FY2007). The FCC's competitive bidding rules in effect for all purposes relevant to the questions in this case were contained in Sections 54.504 and 54.511 of the rules³⁶ as amplified in related Commission orders issued as of the filing dates for the subject FCC Form 471s.

The USAC does not have rulemaking authority, as only the FCC can promulgate rules for the E-Rate program and, prior to 2011, no FCC rules, case law or guidance prohibited the payment of applicant expenses by a service provider when such gifts (a) were of a small monetary value relative to the contracts at stake; (b) occurred in connection with customer conferences which were devoid of any activities that advantaged the service provider; and (c) took place at least three and one-half years after the competitive bidding process pursuant to which the subject funding requests were made. While the USAC has had the task of interpreting the Commission's "fair and open" competitive bidding requirement, the USAC's policies and determinations are not rules, case law or precedent with respect to the Commission's own *de novo* review of individual fact patterns presented by the cases brought before it. The USAC's COMADs must demonstrably reflect that a careful *ad hoc* evaluation of the facts has been done based on the FCC's rules, case law and guidance as of the date of the filing of the FCC Form 471s and that its conclusions are not mere equations; such as a conclusion that the existence of any gift from a service provider to an applicant at any point during a contractual relationship automatically means that an unfair competitive bidding process has occurred.

³⁵ *Id.* at 85-86 (footnote omitted)

³⁶ Copies of 47 C.F.R. §§ 54.504, 54.511 as in effect in 2005 are attached hereto as Exhibit J. No relevant changes occurred in 2006 or 2007.

In its COMADs, the USAC appears to have started prematurely and improperly applying the new gift rules proposed by the FCC in the Notice of Proposed Rulemaking dated May 20, 2010, adopted in September, 2010 and which became effective in January, 2011 even though such rules do not apply to the events of this case.

On May 20, 2010, the FCC adopted a Notice of Proposed Rulemaking in which it “propose[d] that the following behaviors constitute inappropriate conduct during the competitive bidding process: . / . / . / . Service providers may not offer or provide gifts, including meals, to employees or board members of the applicant.”³⁷ On September 23, 2010, the FCC adopted a Sixth Report and Order in which it amended its rules to apply the federal rules concerning gifts and extended the applicability of these new rules beyond the competitive bidding period.³⁸ More particularly, in paragraph 88 of the Sixth Report and Order, the FCC adopts new rules that reflect the use of the gift rules that are applicable to federal agencies – “prohibit[ing] a federal employee from directly or indirectly soliciting or accepting a gift given as a result of the employee’s official position,” except for defined gifts of little value.”³⁹ However, the FCC rules in effect during, and thus applicable to, the 2002 Competitive Bidding Process or FY 2005-2007 funding requests do not contain any reference to the federal gift rules or any of their substance.

The FCC’s new rule also states that “the restriction on gifts is always applicable, and is not in effect or triggered only during the time period when the competitive bidding process is taking place” because “gift activities that undermine the competitive bidding process may occur

³⁷ See *In the Matter of Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan For Our Future*, CC Docket No. 02-6; GN Docket No. 09-51, Notice of Proposed Rulemaking, 25 FCC Rcd 6872, para. 29 (May 20, 2010) (proposing to “identify inappropriate conduct **during the competitive bidding process**” as including: “Service providers may not offer or provide gifts, including meals, to employees or board members of the applicant.” (emphasis added) (“Notice of Proposed Rulemaking”).

³⁸ *In the Matter of Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan For Our Future*, CC Docket No. 02-6; GN Docket No. 09-51, FCC 10-175, Sixth Report and Order, 2010 FCC LEXIS 5840, paras. 87-89, released September 23, 2010 (“Sixth Report and Order”).

³⁹ *Id.* at para. 88 (internal references omitted).

outside the bidding period.”⁴⁰ This language, that “the restriction on gifts is always applicable,” is not a mere codification of what the FCC had previously stated in its rules, decisions or other guidance. It is a new standard. Prior to this, applicants and service providers had every reason to limit their concern to assuring that the competitive bidding process itself be “fair and open” and that this principle applied equally with respect to “gifts.” Indeed, in the Notice of Proposed Rulemaking, the FCC had proposed that its new “gift” rule apply to “inappropriate conduct **during the competitive bidding process.**”⁴¹ In the instant appeal, there is no reasonable basis to conclude that the District and Trillion Partners did anything that affected the fairness and openness of the 2002 Competitive Bidding Process. The FCC’s rules in effect during that bidding process or the FY 2005-2007 timeframe do not contain any language that would support the extension of a gift prohibition outside the competitive bidding process.

At the same time that the FCC released the text of its Sixth Report and Order, it also released a public notice in which it provided guidance with respect to the Sixth Report and Order.⁴² Particularly relevant, the FCC stated that, beyond precedent concerning the “fair and open” competitive bidding process requirement, “more specific gift rules” would become “effective January 3, 2011.” Of course, that date is years after the expenses in this case were incurred and the FCC Forms 471 were filed.

The FCC correctly made no mention in either the Notice of Proposed Rulemaking or the Sixth Report and Order, or anywhere else for that matter, that these new rules would be applied retroactively. As products of a legislative rulemaking proceeding, these new rules are

⁴⁰ *Id.*

⁴¹ Notice of Proposed Rulemaking at para. 29.

⁴² Wireline Competition Bureau Provides Guidance Following Schools and Libraries Universal Service Support Program, DA 10-2356, CC Docket 02-6, at 2 (December 15, 2010).

necessarily for prospective application only.⁴³ The substantial nature of the amendments and the degree of specificity added to the rules also requires a prospective application only.⁴⁴ In this case, the District, as well as many other school districts, acted in reliance on the state of the rules in effect at the time. It would be fundamentally unfair to apply the newly adopted rules retroactively to events that occurred at least two years ago and had no demonstrable effect on the competitive bidding process that took place more than three years before any benefits were received.

Nonetheless, the USAC's actions in this case are consistent with a premature implementation of these newly adopted rules. In the instant situation, the conduct identified by the USAC in its June 4 Letter as creating a violation of the competitive bidding rules occurred in the 2006-2008 time period. The new rules had not even been adopted and certainly were not in effect at that time.

The District submits that the FCC must use the rules in place at the time of the events and that these rules did not include an absolute prohibition of any reimbursed expenses regardless of the amount, timing, relevance to the competitive bidding process or other circumstances.

The District also submits that the FCC must also consider what notice was provided to applicants such as the District regarding acceptance of "gifts" at the time of the expenses relied upon by the USAC in its June 4 Letter. However, the USAC did not identify the expenses that

⁴³ See, e.g., *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987) ("[T]he Administrative Procedure Act generally contemplates that when an agency proceeds by adjudication, it will apply its ruling to the case at hand; when, on the other hand, it employs rulemaking procedures, its orders ordinarily are to have only prospective effect.").

⁴⁴ The D.C. Circuit has established a non-exhaustive list of five factors to assist courts in determining whether to grant an exception to the general rule permitting "retroactive" application of a rule enunciated in an agency adjudication: "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Id.* at 1081.

formed the basis of its COMADs so the FCC cannot even make a fairness determination with respect to whether the District had notice regarding the treatment of “gifts” at the time of the expenses. Even if the expenses in question are those listed in the Trillion Expense Summary, then the Commission must judge the District’s behavior against the guidelines made available to the District as of the times the expenses were incurred.

D. A Proper Application of the Rules and Policies in Effect in the FY 2005-2007 Timeframe Demonstrates That There Was No Violation of the Competitive Bidding Rules in This Case.

At the time the District filed any of the subject FCC Form 471s, the FCC had no rules, policy, guidelines or case law that addressed “gifts” by service providers to applicants. The FCC’s case law and policy determinations relating to the competitive bidding process contain very little guidance with respect to the payment of an applicant’s expenses by a service provider. In addition, the FCC’s competitive bidding rules in effect, namely Sections 54.504 and 54.511, did not contain any reference to a relationship between an applicant and a service provider or “gifts, meals, gratuities, or entertainment.” Nor had the FCC provided the USAC, applicants or service providers with any guidance as to when the payment of an applicant’s expenses for “gifts, meals, gratuities, or entertainment” rise to the level of an “unfair influence [on] the outcome of a competition.” It certainly had not unconditionally prohibited the payment of “meals, travel and lodging” regardless of amount, timing or circumstances or provided any language that supports the type of zero tolerance policy embraced by the USAC in its COMADs.

The FCC had stated that a competitive bidding process must be “fair and open” but even that had not been codified.⁴⁵ According to USAC, the term “fair” means that all bidders are

⁴⁵ See, e.g., Notice of Proposed Rulemaking at para. 26, n. 46; *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26939, para. 66 (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources); See also, <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx> (visited March 30, 2011).

treated the same and that no bidder has advance knowledge of the project information.⁴⁶ The term “open” means there are no secrets in the process – such as information shared with one bidder but not with others – and that all bidders know what is required of them.⁴⁷ These views are consistent with the FCC’s current view that “[g]enerally speaking, all potential bidders and service providers should have access to the same information, they should be treated in the same manner throughout the procurement process, and they should not have additional information beyond the contents of an applicant’s FCC Form 470 or RFP, if the applicant uses these documents to initiate bidding.”⁴⁸ The District understands that the “fair and open” requirement is aimed at those activities that would unfairly influence the outcome of a competitive bidding process. Yet, there were no such activities in this case.

At the time of the “gifts” identified in the June 4 Letter, the Commission had addressed claimed violations of the “fair and open” competitive bidding process requirement in its *MasterMind*⁴⁹, *Ysleta*⁵⁰, *Send*⁵¹ and *Caldwell Parish*⁵² orders. Significantly, in none of those orders, or any other orders, did the FCC address the issue of “gifts” from service providers to

⁴⁶ <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx>.

⁴⁷ *Id.*

⁴⁸ Notice of Proposed Rulemaking at para. 29.

⁴⁹ *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028-4032-33, 10 (2000) (surrender of control of the bid process to a service provider).

⁵⁰ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Rcd 6858, 60 (2003) (posting over-broad Forms 470, making an award to a “systems integrator,” and then allowing the systems integrator to effectively determine what services were needed and what those services would cost and price of the eligible goods; and services must be the primary factor in the bid evaluation process).

⁵¹ *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007) (vendor involvement in the competitive bid process, if not conducted on a neutral basis, could violate the Commission’s competitive bidding rules).

⁵² *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008) (service provider was improperly involved in drafting of the Form 470).

applicants. Thus, these orders provided no guidance to applicants and service providers with respect to “gifts.” Moreover, the fact patterns and issues present in those cases are not present in the instant case.

At the time the FCC adopted its new “gift” rules in 2010, it stated that its precedent establishes that:

it is a violation of the Commission’s competitive bidding rules if: (1) the applicant has a relationship with a service provider **that would unfairly influence the outcome of a competition or would furnish the service provider with “inside” information**; (2) someone other than the applicant or an authorized representative of the applicant prepares, signs and submits the FCC Form 470 and certification; (3) a service provider representative is listed as the FCC Form 470 contact person and that service provider is allowed to participate in the competitive bidding process; (4) a service provider prepares the applicant’s FCC Form 470 or participates in the bid evaluation or vendor selection process in any way.⁵³

With respect to item (1), the FCC clarified, “that an existing relationship between an applicant and its existing service provider does not violate the rule that the competitive bidding process remain fair and open.”⁵⁴ Moreover, in the pre-bidding time period, applicants may discuss their product offerings with service providers and learn about new technologies from service providers.⁵⁵ Thus, it is not an existing relationship between an applicant and its existing service provider that is prohibited. Rather, it is when such a relationship **would unfairly influence the outcome of a competition or would furnish the service provider with “inside” information** that the behavior is proscribed.

Moreover, although not identified in Section 54.504(c)(1) of the FCC’s rules in the list of certifications to be required of an applicant, item 29 of FCC Form 471 requires a certification that “the Billed Entity has not received anything of value or a promise of anything of value, other

⁵³ Sixth Report and Order at para. 86 (emphasis added and internal citations omitted).

⁵⁴ *Id.*

⁵⁵ See USAC 2009 Fall Training and Presentations, http://www.usac.org/sl/about/training-presentations/training-presentations-archive/training-2009/fall/materials.aspx?WT.mc_id=sl-newsbrief-20090918 (visited March 30, 2011) -- USAC, SLD, “Program Compliance,” September/October 2009 at slide 4.

than services and equipment requested under this Form 471, from the service provider(s), or any representative or agent thereof or any consultant **in connection with this request for services.**”⁵⁶ This means that there must be a connection between the receipt of anything of value and the request for services contained in a particular FCC Form 471. Thus, if the expenses that were reimbursed are unrelated to the request for services in a pending FCC Form 471, the certification language does not apply to the reimbursement as a violation of the “fair and open” requirement of the competitive bidding process.⁵⁷ Despite the clear directive from the FCC requiring a connection between a pre-existing relationship or thing of value and a bidding process or request for services, the USAC makes no effort to demonstrate such a relationship and cannot do so because, as a matter of fact, no such relationship existed.

In addition to the FCC’s directive, the USAC itself requires an adverse effect on the actual bidding process. Specifically, the USAC’s advice to service providers at the time of the expenses in question and the time of the District filed its FCC Form 471s was that:

[i]n order to be sure that a fair and open competition is achieved, any marketing discussions held with service providers must be neutral, so as not to taint the competitive bidding process. That is, the applicant should not have a relationship with a service provider prior to the competitive bidding **that would unfairly influence the outcome of a competition or would furnish the service provider with “inside” information or allow it to unfairly compete in any way.**⁵⁸

Yet, the USAC’s COMADs fail to comport with this very guidance. The District **did not** have a relationship with Trillion Partners that unfairly influenced the outcome of a competition or that furnished Trillion Partners with any “inside” information or allowed it to unfairly compete in any

⁵⁶ 47 C.F.R. Section 54.504(c)(1); FCC Form 471 at item 29 (emphasis added); Instructions for FCC Form 471, item 29.

⁵⁷ In any event, the USAC did not mention this certification in the COMADs as a basis for rescission of the FCDLs or recovery of any disbursed funds.

⁵⁸ See <http://www.usac.org/sl/providers/step03/> (February 25, 2008) (emphasis added); <http://www.universalservice.org/sl/tools/news-briefs/preview.aspx?id=130> December 7, 2007) (emphasis added); http://www.universalservice.org/_res/documents/sl/html/sl-newsbrief-20061201.aspx (December 1, 2006) (emphasis added); <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx> (emphasis added).

way. In fact, at the time of the 2002 Competitive Bidding Process, the District and Trillion Partners had no relationship whatsoever. Moreover, during the period in which the conference-related expenses mentioned in the June 4 Letter occurred, the relationship that the District had with Trillion was that of vendor-customer, which was due to the existing five-year 2003 Contract awarded pursuant to USAC-related competitive bidding processes - not in anticipation of a future award of a contract in a USAC-related competitive bidding process. Expenses associated with attendance at customer conferences and an occasional lunch are well within a neutral, arms-length vendor-customer contractual relationship for E-Rate purposes. As a practical matter, communication between a school district and its existing vendors is essential in order for the school district to obtain the full benefits of the services being provided under a currently-effective contract. As described *infra*, the District's "relationship" with Trillion was limited to a communication-exchange at the VTEC educational conferences that was informational in nature and conducted in a neutral manner that could not and did not bear any relation to the 2002 Competitive Bidding Process that was completed years earlier.

In addition to its "unfair influence" and "inside information" prohibitions, the USAC has admonished that service providers must not "provide free services and/or gifts **to ensure bid selection.**"⁵⁹ The USAC's concern was clearly that service providers should not provide free services or gifts to the applicant **for the purpose of ensuring selection in the competitive bidding process.** In advising against a purposeful linkage between such gifts and bid selection, the USAC's advice did not extend to situations where the gifts occurred outside of the competitive bidding process or had no relationship to procuring services identified in a FCC

⁵⁹ See www.usac.org/res/.../about/.../sl-overview-service-providers-brochure.pdf ("What To Do and How To Do It," Mel Blackwell and John Noran, 2008 Service Provider Training, Schools and Libraries Division at slide 22); see also "Service Provider Do's and Don'ts," Mel Blackwell and John Noran, 2007 Service Provider Training, Schools and Libraries Division at slide 22) (emphasis added).

Form 471. Thus, according to the USAC's own advice, in order for the receipt of anything of value from a service provider to threaten the openness and fairness of a competitive bidding process, it must be the result of an effort by the service provider to "ensure bid selection."

Clearly, the USAC's concern that service providers will attempt to ensure bid selection by providing free services or "gifts," is not implicated when the "gifts" in question are not provided until years after the competitive bidding process relevant to the funding commitment being challenged has closed. Moreover, the District states unequivocally that it did not interpret any actions of Trillion Partners as an effort to influence the District with respect to any competitive bidding process and that the payment of the expenses identified in the June 4 Letter had absolutely no effect on any competitive bidding process conducted by the District. Of course, for this to even be an issue, there needs to be a competitive bidding process in which to "ensure bid selection" and documented fact-finding by the USAC of an actual linkage between the "gifts" and a "competitive bidding process -- neither of which occurred here. Without a transparent, fact-based analysis, a USAC conclusion in this case that gifts were provided to ensure selection in a competitive bidding process or influenced such selection is bare and unjustified.

Setting aside USAC's failure to comply with its own substantive guidelines, the COMADs reflect USAC's deviation from its procedural requirements as well. As recently as 2009, the USAC was advising service providers and applicants that it would review gifts on a case-by-case basis to determine whether they violate FCC rules for a fair and open competitive bidding process.⁶⁰ Yet, the USAC's decision in the COMADs leaves no room whatsoever for

⁶⁰ See USAC 2009 Fall Training and Presentations, http://www.usac.org/sl/about/training-presentations/training-presentations-archive/training-2009/fall/materials.aspx?WT.mc_id=sl-newsbrief-20090918 (visited March 30, 2011) -- USAC, SLD, "Issues in Competitive Bidding," September/October 2009 at slide 17. It bears noting that in its training presentations being given in the Fall of 2010, the USAC

such an *ad hoc* fact-specific evaluation of this particular case. The USAC adopted the position in this case that, for purposes of the FY 2005-2007 time period, **any** “gifts, meals, gratuities, entertainment of **any** amount from the service provider” prior to/throughout a contractual relationship between an applicant and a service provider result in a competitive process that is no longer fair and open **regardless of the circumstances**. This means, according to the USAC in this case, that as far back as three or more years ago, a service provider may not have provided an applicant, and an applicant may not have accepted, any “gifts, meals, gratuities, or entertainment” of any amount at any time during an existing contract regardless of how far removed from any competitive bidding process or the lack of relationship between the circumstances of the “gifts, meals, gratuities, or entertainment” and the competitive bidding process. This “zero tolerance” position is extreme and divorced from the USAC’s stated responsibility for investigating whether the receipt of any gifts had an actual effect on a competitive bidding process, as well as USAC’s own advice during the 2007-2008 time period.

Applying the rules and policies in effect during FY2005, FY2006 and FY2007, the relevant timeframe for evaluating applicant and service provider conduct is the competitive bidding process itself.⁶¹ That process began with the posting of the FCC Form 470, in this case

has incorporated all the new gift rules adopted by the FCC on September 23, 2010. This appears to be in anticipation of these new rules becoming effective. Yet, it is these newly adopted gift rules that the USAC has applied in the case of the Charlotte County School District FY2008 requests. Clearly, the USAC has not only gotten ahead of the FCC’s adoption of the new gift rules but has erroneously applied the proposed rules retroactively as if they were applicable to the 2007-2008 time period even if they had been adopted and become effective as of the time of the USAC’s June 4 Letter and September 15, 2010 FCDL.

⁶¹ Notice of Proposed Rulemaking at para. 29. The expansion of the prohibition outside of the competitive bidding process was proposed in the May, 2010 Notice of Proposed Rulemaking and adopted in the Sixth Report and Order in September, 2010. This amendment was not in effect in 2005- 2007 timeframe and did not become effective until January, 2011.

December 3, 2002, and was completed 28 days later, on December 31.⁶² This is the relevant timeframe for the USAC's evaluation.

The notion that the USAC can consider any event that occurred “prior to/throughout the contractual relationship with the service provider,” is not grounded in any FCC rule, policy or interpretation in existence at the time of the filing of the FCC Forms 471 for FYs 2005, 2006 and 2007. The District appreciates the need to maintain a “fair and open” competitive bidding process, but automatically equating any expenses during a pre-existing contractual relationship with a violation of the “fair and open” requirement is an unreasoned and unjustified interpretation of that requirement. Indeed, without requiring a fact-specific nexus between the “gifts, expenses and entertainment” and the competitive bidding process, the “prior to/throughout the contractual relationship” standard used by USAC leaves wide open the timeframe within which “gifts, expenses and entertainment” of any amount, are prohibited regardless of whether they bear any actual connection to a competitive bidding process. Such a standard was not in effect during the 2002 Competitive Bidding Process or the District's filing of the FCC Forms 471 or participation in the VTEC conferences. Thus, the District had no notice that the USAC's newly-implemented “zero tolerance” standard would be used to evaluate the payment of any expenses.

In the instant case, the USAC does not identify any specific payment of “gifts, expenses and entertainment” or when such payment was believed to have occurred. Indeed, the USAC does not allege that any such payments occurred during the competitive bidding process. The District submits that the Commission does not have enough information from USAC to justify

⁶² <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx> (visited March 30, 2011) (competitive bidding process opens with the posting of the FCC Form 470; <http://www.universalservice.org/sl/tools/news-archive/2010.aspx> (visited March 30, 2011) (competitive bidding process closes at end of 28-day period and before filing of the FCC Form 471).

the USAC's conclusion. Even if the Commission were to consider extra record evidence from the earlier appeal involving FY 2008, all expenses and events identified by the USAC in that case occurred well outside of the 2002 Competitive Bidding Process, which is relevant to this case, and, under applicable rules, the inquiry should end there. Moreover, there is no basis to believe that the expenses or the events associated with the expenses have any connection whatsoever to any competitive bidding process and the USAC has presented no evidence to the contrary.

The USAC has presented no evidence that anything about the existing contractual relationship in this case “unfairly influence[d] the outcome of a competition or furnish[ed] the service provider with “inside” information.” In fact, the USAC as failed to even allege any “sharing of information with one bidder but not with others” or that any “bidder had advance knowledge of the project information.” Specifically, the USAC has presented no evidence that any of the unidentified “gifts, expenses and entertainment” referenced in the COMADs “unfairly influence[d] the outcome of a competition.” In fact, there is no record support for the USAC's stated basis for the COMADs. Moreover, at all relevant times, there was no FCC rule, case law, policy or interpretation that stated that the provision of any “gifts, expenses and entertainment” by the service provider automatically required, without any showing whatsoever of a fact-specific cause and effect relationship, finding that the contractual relationship would unfairly influence the outcome of a competition.

As to the facts of this case, the USAC has taken the requirement that a competitive bidding process be “fair and open” and spiraled out of control with a series of policy and legal determinations of its own without reference to any FCC policy, rule or case law concerning “gifts.” The FCC's rules clearly state that the USAC “Administrator may not make policy,

interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”⁶³ [Section 54.702(c)]. Yet, this is what the USAC has done with the “gifts, expenses and entertainment” issue. The USAC could easily have requested the FCC’s guidance on the “gifts, expenses and entertainment” issue as it has done with other issues.⁶⁴ However, there is no evidence that the USAC has ever done so.

The District submits that, during the relevant time period, the determination of whether gifts were provided to ensure selection in a competitive bidding process and whether such gifts unduly influenced a competitive bidding process is necessarily an *ad hoc* process that requires a case-by-case assessment of whether the timing, amount and nature of the “gifts, meals, gratuities, or entertainment” in question rise to the level of an “unfair influence [on] the outcome of a competition.” As such, it requires consideration of the timing, amount of the expenses and circumstances surrounding the “gifts, meals, gratuities, or entertainment” at issue here. The USAC did not do that in this case. In point of fact, the USAC does not even identify what expenses or what competitive bidding process was the object of its concern.

As the Commission conducts its *de novo* review in this case, the District urges the Commission to carefully consider the facts as set forth in the next section.

⁶³ 47 C.F.R. Section 54.702(c).

⁶⁴ See FCC Public Notice DA 11-432 (WC Docket No. 06-122, CC Docket No. 96-45), Comment Sought on Universal Service Administrative Company’s Request for Universal Service Fund Policy Guidance, released on March 7, 2011; Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, Federal Communications Commission, to Richard A. Belden, Chief Operating Officer, Universal Service Administrative Company, dated January 21, 2011 (regarding USAC request for guidance on duplicate Lifeline claims); Letter from Dana R. Shaffer, Deputy Managing Director, Federal Communications Commission, to Scott Barash, Acting Chief Executive Officer, Universal Service Administrative Company, dated October 13, 2010 (regarding FCC guidance to the USAC on audits); Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, Federal Communications Commission, to Scott Barash, Acting Chief Executive Officer, Universal Service Administrative Company, dated January 16, 2009 (regarding USAC request for guidance on recovery of funds).

E. Facts Relevant to an Ad Hoc Determination.

1. Amount of Expenses

As noted earlier, in its COMADs for the FY 2005, 2006 and 2007 funding requests, the USAC does not identify the amount of the “gifts, gratuities, expenses and entertainment” that it relied upon to reach its conclusion or even what they were or when they occurred. However, to the extent that the Commission chooses to consider the Trillion Partners Expense Summary referenced by the USAC in its June 4 Letter, it is clear that the amount of the expenses at issue in no way could be deemed to justify a conclusion that a competitive bidding process was not “fair and open.”

The Expense Summary identifies an average of \$550 in primarily conference-related meals, travel and lodging per year for the 2006-2008 time period.⁶⁵ Leaving aside for the moment that these expenses were incurred years after the 2002 Competitive Bidding Process, their amount cannot support any reasonable concern that they had the effect of rendering unfair a competitive bidding process for the District’s five-year contract, valued at \$2.5 million. Put another way, the notion that Trillion’s payment of \$1,652.25 in expenses associated with industry conferences over a three-year period and having no demonstrated relevance to a competitive bidding process⁶⁶ would somehow prejudice the District in favor of awarding Trillion a \$2.5 million (\$500,000 per year for five years) contract— a notion the USAC all too readily embraces — is simply not tenable.

In its June 4 Letter, the USAC states that in the District’s June 25, 2009 email response to a data request from Mrs. Barbara Cannon of USAC, “Mr. Bress discusses that he did receive

⁶⁵ See *supra* for a discussion of the expenses; see Trillion Partners Expense Summary (appended to Exhibit G).

⁶⁶ See discussion of the conferences *infra*.

lunch meals from Trillion Partners representatives.” Mr Bress’s full response in this regard consists of the following:

When representatives from Trillion would come to the school district they would often offer to take me out to lunch. I took them up on their invitation on a few occasions. I considered the frequency of their visits to be normal and I did not take it as out of the ordinary. I am sorry, but I do not have a log of dates as to when this happened. The places that we went to lunch at were on the par of Applebees or TGI Fridays. None of the locations were excessive.

While Mr. Bress’s response explains that he cannot quantify the cost of the lunches, it is clear that they occurred infrequently, were of minimal cost and done in the ordinary course of business. In addition, the District takes this opportunity to add that none of these lunches occurred during a competitive bidding process or involved discussions of any competitive bidding process, or the services that would be part of any such process, and that the discussions that did occur were related solely to the implementation of services under the existing 2003 Contract.⁶⁷ Indeed, the Trillion Expense Summary reflects these fact. Accordingly, the District submits that these lunches should not form the basis for denial of FRNs with an aggregate funding commitment value in excess of \$709,000 or that acceptance of such lunches could have possibly influenced the District to skew a competitive bidding process for a five-year, \$2.5 million contract.

2. Timing

The funding commitment requests at issue are for FY 2005, 2006 and 2007 and stem from the 2002 Competitive Bidding Process and the five-year 2003 Contract. Yet, the “gifts” identified by the USAC in its June 4 Letter all occurred at least three and one-half years after the closing of the 2002 Competitive Bidding Process that the USAC states was rendered unfair and not open by such “gifts.” Thus, even if the Commission were to consider the expenses identified

⁶⁷ See Attachment 1, Declaration of Christopher Bress.

in the Trillion Partners Expense Summary to be improper at the time of their receipt, the District submits that expenses incurred more than three years after a competitive bidding process has closed have no relevance whatsoever to an analysis of the fairness and openness of that competitive bidding process.

In addition, the 2007 Competitive Bidding Process has no relevance to the FY 2005, 2006 and 2007 funding commitment requests at issue in this case because those funding requests relate to the 2002 Competitive Bidding Process and 2003 Contract.⁶⁸ As in the case of the September 15, 2010 FCDL – which is subject to a pending appeal -- any conclusions that the USAC may reach with respect to the fairness and openness of the 2007 Competitive Bidding Process must be in the context of funding commitment requests submitted pursuant to the 2007 Competitive Bidding Process and the 2008 Contract.

As noted repeatedly herein, in the COMADs, the USAC does not identify what particular expenses are at issue or the amount of those expenses or the particular timeframe it considered. It only states that some “gifts, gratuities, expenses and entertainment” occurred “prior to/throughout” the contractual relationship between the District and Trillion Partners. There is no connection between any “gifts, gratuities, expenses and entertainment” and a competitive bidding process in this case. Specifically, there is no connection, apparent or otherwise between the VTEC conferences or the payment of the expenses on the one hand and a competitive bidding process on the other.

Moreover, At all times relevant to FY 2005, 2006 and 2007, the 2003 Contract was still in effect and the existing contractual relationship between the District and Trillion Partners was

⁶⁸ In any event, it is unclear why the USAC would believe, without more, that expenses incurred approximately three (3) months (in the case of the expenses incurred in 2007) or fifteen (15) months (in the case of expenses incurred in 2006) before the commencement of the 2007 Competitive Bidding Process or six (6) months (in the case of expenses incurred in 2008) after the closing of the 2007 Competitive Bidding Process, have any relevance to that competitive bidding process. *See* Trillion Partners Expense Summary

consistent with traditional and lawful notions of a customer/vendor relationship, as allowed by the then applicable FCC rules, guidance and case law. Simply put, receiving gifts and attending conferences more than three years after a bidding process has closed could not and did not effect the 2002 Competitive Bidding Process or awarding of the 2003 Contract; and the USAC has presented no evidence to the contrary.

3. Circumstances

Once a competitive bidding process is over and a vendor has been selected, it is hard to discern how the post-selection contractual relationship can taint that competitive bidding process or, for that matter, a future competitive bidding process that has not yet begun or even been announced. Moreover, the nature of the relationship with a vendor is markedly different after selection and during a contract period because of the need to accommodate the discussions and meetings that are necessary for the vendor to fulfill its contractual obligations and for the District to obtain the benefits of the contract.

At the time of any of the VTEC conferences, the five-year contract between the District and Trillion that commenced with FY2003 was still in effect and the District was an existing customer of Trillion Partners.⁶⁹ Participation in the conferences by the District was related to the then-existing contract, not any former or future competitive bidding process. Moreover, in the pre-bidding time period, applicants are permitted to discuss their product offerings with service providers and learn about new technologies from service providers.⁷⁰

⁶⁹ “Once an applicant submits an FCC Form 470 and complies with the 28-day posting period, the applicant is permitted to sign a long-term contract at that time.” Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, DA 99-1773, 1999 WL 680424 (Com. Car. Bur. 1999), para. 10 (“We conclude that permitting a school or library to commit to a long-term contract after participating in the competitive bidding process does not compromise the benefits derived from competition. As long as all providers have had the opportunity to compete for the same contract, schools, or libraries can enter into renewable contracts of any length or form, as permitted by state law.”)

⁷⁰ See USAC 2009 Fall Training and Presentations, http://www.usac.org/sl/about/training-presentations/training-presentations-archive/training-2009/fall/materials.aspx?WT.mc_id=sl-newsbrief-

The VTEC conferences were described by Trillion Partners in a letter to Mel Blackwell of USAC dated June 8, 2009, as follows:

educational conference[s] for existing Trillion customers after they were under contract with Trillion. This was a participant-driven conference focused on education-oriented best practices. The main goal was improving education and the application of technologies to achieve this goal. Guest speakers included nationally renowned speakers including a University professor and a learning technology expert, neither of whom were associated with Trillion. Each participant shared their thoughts in an open discussion forum on what they generally thought would shape education in the years to come.⁷¹

The 2006, 2007 and 2008 VTEC conferences were attended by representatives from school districts throughout the country that were existing customers of Trillion Partners and wanted to discuss education technology issues with their peers.⁷² These VTEC conferences focused on providing each attending district an opportunity to share best practices and applications, their particular vision of education technology, the steps taken to implement that vision and how it is translating into student success. The districts learned from each other as well as from guest speakers not associated with Trillion Partners. As part of this forum, Trillion Partners held Q & A and open discussion sessions for district representatives to ask Trillion Partners team members questions concerning technology, network, services, and new education technology trends. Any Trillion marketing sessions at these conferences was unrelated to any District competitive bidding process. In fact, given attendance from numerous school districts from different states, it would be unreasonable to assume that any such marketing sessions would be tailored to any particular school district's competitive bidding process. Rather, these sessions were limited to general presentations of advanced educational technology services available from Trillion. None

20090918 (visited March 30, 2011) -- USAC, SLD, "Program Compliance," September/October 2009 at slide 4.

⁷¹ Trillion Response/Appeal Letter at 2.

⁷² For example, representatives from ten (10) school districts in six (6) states attended the 2006 VTEC conference on July 27-28, 2006.

of these sessions involved anything that related to the timing or substance of any District competitive bidding process. Indeed, expenses associated with the VTEC conferences or the substance of the conferences themselves in no way affected any competitive bidding process.

For example, the centerpiece of the first day of the VTEC conference held on June 24-25, 2008, was a session among participating school districts where the Technology Director of each participating school district had the opportunity to share a best practice or improvement implemented in the past year, noting details on how the changes affected students' scores, retention rates, or resulted in a positive impact for educators & administrators. The keynote speaker on the second day of the conference was a university professor who specializes in learning technology and who spoke on best practices in technology planning and management and computer-supported collaborative learning. Neither the participant-driven session nor the keynote speaker session involved a Trillion Partners' presentation regarding any services that were the subject of any current competitive bidding process. The same can be said for (a) a session involving representatives of Compass Learning on the subject of using technology to drive education, focusing on the use of brain research findings showing how children maximize learning by using computer applications; and (b) a Shoretel company that made a presentation on the VOIP roadmap for unified communications, detailing next generation features.

The presentations that were made by Trillion Partners were either Q & A sessions that provided the representatives of the school districts with access to Trillion Partners technical personnel and general marketing, in either case nonspecific to any participation in, or the services that were the subject of, an ongoing or upcoming competitive bidding process.

The District submits that attendance at these types of conferences by applicants are in the best interest of the E-Rate program because they serve as a forum for the exchange of ideas and

experiences among school districts and improve the level of knowledge in critical areas on a neutral basis. The mere fact that Trillion Partners paid the expenses of an existing customer associated with attendance and a speaking engagement at a conference it organized specifically for its existing customers and that focused on the exchange of ideas and experiences among school districts and the improvement of the level of knowledge in critical areas with only general marketing unrelated to any competitive bidding process in substance or timing does not automatically mean that a competitive bidding process that concluded more than three years earlier was somehow tainted. The competitive bidding rules in effect required that such situations be judged on an *ad hoc*, fact-driven, case-by-case basis. Even if the VTEC conferences were considered to be sufficiently proximate in time to a competitive bidding process to warrant consideration -- which they were not -- it defies common sense to leap to a conclusion that a school district would endanger a five-year \$2.5 million contract or even a single year \$500,000 funding request in order to have a few hundred dollars in travel and lodging expenses paid for a non-decision maker to attend a customer conference.⁷³ Moreover, there is no allegation that any aspect of these conferences or any discussions at those conferences involved anything that affected or even related to any competitive bidding process.

As noted on the Expense Account Summary submitted by Trillion Partners with its June 21, 2010 appeal in this case, Mr. Bress's transportation and lodging expenses reimbursed by Trillion Partners were in connection with his attendance at the 2006, 2007 and 2008 VTEC conferences at which he was an invited speaker given his industry expertise.⁷⁴ Mr. Bress is very well regarded and knowledgeable in matters concerning technology for educational institutions. Indeed, he is the current President of the Florida Council of Instructional Technology Leaders

⁷³ As explained below, Mr. Bress played no role in selecting Trillion for the 2003 Contract.

⁷⁴ See Trillion Partners Expense Summary

(the “FCITL”), a non-profit organization whose purpose is to (a) promote the enhancement of the instructional process through the effective use and integration of technology; (b) promote cooperation and communication among the district and state leaders who impact technology use in education; (c) positively influence legislation and policies regarding funding, development, and integration of instructional technology use in Florida; and (d) recognize the vital role of the instructional technology professional and promote professional growth opportunities.⁷⁵

Mr. Bress has been a speaker at several conferences sponsored by many different companies, and each time the conference sponsor has paid his travel, accommodation and meal expenses.⁷⁶ This is the only way that representatives of school districts can afford to attend and be speakers at such conferences without relying on scarce public school district funds. Mr. Bress attends and speaks at these conferences for the purpose of staying abreast of changes to the rapidly evolving technology and the availability of new services, and to share his knowledge and experiences with other school districts whose representatives also attend the conferences.

The District’s selection of Trillion was in no way related to Mr. Bress’ attendance at these conferences. Mr. Bress is the Director of Learning Through Technology for the District.⁷⁷

⁷⁵ See <http://www.fcitl.org/aboutUs.asp> (visited March 30, 2011). FCITL membership consists of (a) personnel from a public school district who have district-wide responsibilities; (b) DOE personnel; (c) private school personnel; (d) post-secondary personnel; (e) persons who have retired from any of the preceding positions; and (f) personnel from an organization with a public school district as a fiscal agent and Education consortia personnel. See *id.*

⁷⁶ The following articles indicate why the Charlotte County School District and Mr. Bress in particular are well regarded in the education technology industry:
<http://thejournal.com/articles/2007/09/01/disaster-recovery--courting-disaster.aspx>
<http://www.edtechmag.com/k12/issues/january-february-2009/going-the-distance.html>
<http://thejournal.com/articles/2010/08/01/shape-throttle-and-roll.aspx>
http://www.pcworld.com/businesscenter/article/144637/guide_to_secure_web_gateways.html
<http://www.techlearning.com/article/26260>
http://www.bluecoat.co.jp/customers/pdf/casestudy_charlotte.pdf
<http://www.edtechmag.com/k12/issues/april-may-2010/a-touching-story.html>
<http://www.edtechmag.com/k12/events/videos/videos.html>

⁷⁷ The Learning Through Technology department supports the use and growth of instructional technology in Charlotte County Public Schools. Under the supervision and control of the District administration, it is tasked with the responsibility of supplying the hardware, software, and Internet bandwidth the District schools and students need to be successful in a digital world.

However, decisions concerning the award of contracts for the District are made by its School Board. Mr. Bress is not a member of the Board and in no way was a decision maker with respect to the selection of service providers participating in a competitive bidding process.

There has been no evidence presented that Mr. Bress or anyone else at the District had any communication whatsoever with a representative of Trillion Partners at any of the conferences or at any other time concerning the procedures or the substance of any pending or planned competitive bidding process that could reasonably be thought to have provided Trillion Partners with any kind of inside information or other undue preference. There has also been no evidence whatsoever presented that there was a competitive bidding process underway at the time of the VTEC conferences or that any such future process was in any way influenced by the conferences, any communication at the conferences or the reimbursement of the expenses in question.

Finally, the USAC has not questioned either the FCC Form 470 (458640000438013) posted on December 3, 2002 or the FCC Form 470 (36708000062396) posted on November 6, 2007. Those FCC Forms 470 are very straightforward and the requests for services are impartially drafted. They were not tailored to suit any one company or type of company and no evidence to the contrary has been presented. The FCC Forms 470 were intended to attract as many competitive bidders as possible while assuring that it accurately reflected the status of the project and that the needs of the District would be met. Trillion Partners had no input or influence, direct or indirect, in the drafting of the FCC Forms 470 or the competitive bidding processes that ensued. While it is unfortunate that only Trillion Partners responded to the FCC Form 470, the District cannot account for why only one bidder emerged. However, the reason(s) likely involve economic conditions and that Trillion happens to be the leading provider of the

WAN services sought by the District. The District agrees that although having only one bidder is not optimal, it can say without reservation or condition that this was not the result of any unfair conduct by the District.⁷⁸ Moreover, the FCC has stated that “our rules require applicants to seek competitive bids; they do not require an applicant to have competing bidders where none appear.”⁷⁹ Nonetheless, the fact that Trillion Partners was the only bidder in response to the FCC Forms 470 means, in effect, that once the 2002 Competitive Bidding Process concluded on December 31, 2002, there was no opportunity for the District to engage in unfair or anticompetitive behavior in considering Trillion’s bid.

The District fully understands that “the competitive bidding process must be fair and open [and that] ‘Fair’ means that all bidders are treated the same and that no bidder has advance knowledge of the project information [and that] ‘Open’ means there are no secrets in the process – such as information shared with one bidder but not with others – and that all bidders know what is required of them.”⁸⁰ The District’s competitive bidding process and treatment of bidders fully comports with these admonitions and no evidence to the contrary has been presented. During the relevant timeframe, the FCC required that routine business meals and expenses involved in attending the VTEC conference must comply with state and local procurement laws and regulations, and there were no federal guidelines on this issue. The District has certified compliance with state and local procurement laws and regulations⁸¹ and such compliance is not an issue in this case. Indeed, the USAC has never raised this matter.

⁷⁸ As Trillion Partners states on its own website, “Trillion is the largest national service provider of fixed wireless and fiber wide area networks for K-20 school districts in the country. We currently manage over 200,000 miles of networks and provide services to over 1,000 schools coast to coast in the United States.” www.trillion.net/about/.

⁷⁹ *Request for Review of the Decision of the Universal Service Administrator by Winston Salem County School District*, CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 26457, 26462 (2003).

⁸⁰ <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx>.

⁸¹ See Exhibits E and F (certifications contained in the District’s FCC Forms 471).

V. ALTERNATIVE REQUEST FOR WAIVER

In the event the Commission is not disposed to reverse the COMADs, the District urges the Commission to grant a waiver of the “fair and open” competitive bidding requirement, as interpreted by the USAC, for the reasons described herein.

The Commission may waive any provision of its rules on its own motion or following a showing of good cause.⁸² Waiver is appropriate when the facts of a particular case make strict compliance inconsistent with the public interest.⁸³ The Commission also considers the factors of hardship, equity, or more effective implementation of overall policy on an individual basis.⁸⁴ In sum, a request for waiver should be granted when special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁸⁵

A. Neither the Commission’s Interest in a Fair and Open Bidding Process nor the Public’s Interest in Providing Funding for Advancing Technology in Schools will be Furthered by Enforcing USAC’s Determinations.

In this case, strict compliance with USAC’s interpretation of the Commission’s “fair and open” competitive bidding policy in effect at the time of the conduct at issue in this case does not further the Commission and public’s interest in ensuring that public funds are properly allocated through a “fair and open” competitive bidding process so as to avoid abuse, waste and fraud.⁸⁶ This is because there is no evidence that any benefit received by Mr. Bress had any effect on the

⁸² Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, allows for waiver of Commission rules if special circumstances warrant deviation from the general rule and such deviation will serve the public interest. *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), *cert. denied*, 409 U.S. 1027 (1972).

⁸³ *Northeast Cellular*, 897 F.2d at 1166.

⁸⁴ *WAIT Radio*, 418 F.2d at 1157.

⁸⁵ *Northeast Cellular*, 897 F.2d at 1166.

⁸⁶ As discussed elsewhere in this pleading, the Commission’s “fair and open” competitive bidding policy in effect at the time of the filing of the relevant FCC Forms 471 or the expenses in question was not codified until years after those events occurred. As a result, it is the USAC’s interpretation of a Commission policy (rather than a rule) that is the subject of this waiver request.

District's selection of Trillion for the 2003 Contract.⁸⁷ In fact, the evidence is just the opposite: that the lone benefits cited by USAC were received three-and-a-half years after the conclusion of the allegedly tainted bidding process; that Mr. Bress was not a decision maker in the District's selection of Trillion as its service provider; and that Trillion was the lone bidder for the District's 2003 Contract. Also, because the benefits targeted by USAC took place years after bidding for the 2003 Contract closed, there simply cannot be any evidence that Mr. Bress, or the District, intended to violate any rules or requirements related to the bidding process for the 2003 Contract. Thus, although the Commission has a clear interest in ensuring that government funds are spent efficiently and without fraud, abuse or waste, those interests will not be furthered through enforcement of USAC's interpretation of the "fair and open" requirement in this case because, as a matter of both fact and logic, the bidding process for the 2003 Contract was not at all affected by the receipt of any benefits. Simply put, in this case there is no fraud, abuse or waste that would be avoided by the USAC's interpretation of Commission policy.

The special circumstances of the case also demonstrate that the public's interest in providing notice and due process prior to refusing or requiring repayment of government funds offered to improve the education available in schools will not be furthered by adhering to USAC's application of the fair and open requirement. Through the E-Rate program, the Commission has demonstrated its, and the public's, interest in providing schools throughout the country with access to telecommunications and internet technology and has committed to providing funding for such projects so that schools are not forced to choose between acquiring this technology at the expense of other programs. As part of the program, the Commission has

⁸⁷ As discussed above, the District maintains that USAC's COMAD decisions go far beyond applying the Commission's "fair and open" requirement as it existed at the time the FCC Forms 471 were filed or the expenses occurred. Yet, to the extent that the Commission is unwilling to reverse the USAC's interpretation of the "fair and open" standard, the District requests that the Commission waive this specific application of its policy. It is not asking that the general "fair and open" requirement be waived.

set forth rules governing participation and publishes such rules as well as case law and guidance so that applicants can ensure their eligibility for E-Rate funds.

The District has complied fully with the Commission's rules, policies and interpretations that were in effect at all relevant times so that it could ensure its eligibility in the E-Rate program and provide its students with the intended benefits. While the District did have a contractual relationship with Trillion at the time of the expenses in question, it was not a relationship that would interfere with its ability to hold a fair bidding process and it did not provide Trillion with any inside information or advance notice of the bid. It was a typical vendor/customer relationship pursuant to existing contracts that had been awarded years earlier as a result of an impartial competitive bidding process. There was no rule, case law or other guidance providing notice that the payment of nominal benefits by a service provider more than three years after a bidding process was complete would result in repayment of federal funds received as a result of the bidding process.

To apply USAC's newly-implemented rule retroactively deprives the District of not only notice and due process, but also the benefits intended by the E-Rate program because the District will be required to fully fund efforts that the Commission and public have intended to be subsidized. Specifically, the COMADs represent a possible \$611,032.37 financial liability to the District if the disbursed funds for FY 2005, 2006 and 2007 are recovered. This would be an incredible burden to the District since these funds were applied for, approved, disbursed, and then spent in good faith in furtherance of the purposes of the E-Rate program. If required to repay these funds, the District would have to cut related, and crucial, services and severely impact the instruction of its students because these funds must come out of the District's operating budgets, which makes this substantial sum of \$611,032 even more problematic, if not

impossible, to reach in the short term. The District would be required to cut access to its “Compass Learning” program, which it provides to all of its kindergarten through eighth-grade classrooms, “United Streaming”, which is used in kindergarten through high-school, “NetTrekker”, also used kindergarten through high-school and “Country Watch”, used ninth-grade through twelfth-grade, as well as many tools that the District uses to assure the correct functioning of its local area networks, its wide area network, and its servers. Even with all of these cuts, the District would still be approximately \$400,000 short. Next, the District would be forced to cut its entire budget for non web-based Academic Software. This would create a significant void in the way it provides instruction to its students. Finally the last \$200,000 would cause the District to cut technical support services and training to its schools. These services are critical to the successful implementation of new state-wide directives from the Department of Education as the District rolls out online end-of-course testing.

This result benefits neither the District nor the public, particularly when there is no evidence that the District’s contract with Trillion was not the result of a fair and open bidding process, or resulted in waste, abuse or fraud.

B. The Additional Factors of Hardship and Equity Also Support Waiver.

The hardship that will result from USAC’s determinations supports waiver. USAC will seek recovery of \$611,032.37 in disbursements received by the District during FYs 2005 – 2007. This money has long been spent and, as described above, is not accounted for in the District’s budget. Thus, repayment of the disbursements will impose a hardship on the District’s ability to fund academic and extracurricular programs for its students. It is incongruous to approve the FCC Forms 471, disburse the funds and allow them to be spent only to revisit these actions five (5) years later and demand recovery of the disbursed funds. The USAC’s interpretation effectively requires a school district to not seek disbursement or expenditure of the committed

funds until five years have passed lest it risk having to return hundreds of thousands in committed funds because -- five years later -- the USAC believes that the payment of a few hundred dollars in expenses by a service provider automatically constitutes a previously unidentified violation of the “fair and open” competitive bidding process requirement despite no demonstrable connection between such expenses and any competitive bidding process. Yet, the USAC requires that the disbursement and expenditure of committed funds within the FY for which the funds were committed.⁸⁸ In effect, this forces school districts to spend the approved and disbursed funds four (4) years before the USAC may still order the recovery of the funds. The District submits that this approach to the issue undermines the very purpose of the E-rate program because it creates a severe chilling effect on the willingness of school districts to seek much needed funding.

As noted, the expenses in question were incurred three and one-half years after the conclusion of the competitive bidding process that led to the 2003 Contract under which the FY 2005, 2006 and 2007 funding requests were made. Thus, the timing considerations attendant to the relevant facts in this case essentially foreclose a conclusion that the competitive bidding

⁸⁸ See Instructions for Completing the [USAC] Billed Entity Applicant Reimbursement (BEAR) Form for FCC Form 472 at 5, http://www.usac.org/_res/documents/sl/pdf/472i.pdf (“only services received and paid for in the current program year are eligible for discounts”). In this case, for example, the USAC required the District to file its FCC Form 471 seeking FY 2005 funding approval by February 18, 2005. The USAC issued its FCDL on February 8, 2006 approving the District’s funding request. Because the USAC requires that eligible, recurring services must be received during the relevant FY, Trillion was required to provide its services to the District for the FY 2005 request by June 30, 2006. See USAC Schools & Libraries Division website, available at <http://www.usac.org/sl/applicants/step11/service-deadlines-extension-requests.aspx>. The District paid Trillion directly while the services were being performed. Per the USAC’s requirements, once the services are complete, the District had 120 days to submit an invoice to USAC seeking reimbursement of amounts previously paid to Trillion; meaning that the District’s invoice for FY 2005 was due to the USAC by the end of October 2006. See <http://www.usac.org/sl/applicants/step11/invoice-deadlines-extension-requests.aspx>. Thus, the District was effectively required to commit to a FY 2005 funding request by February 18, 2006, obtain the USAC’s approval for the funds, receive and pay for Trillion’s recurring services by June 30, 2006 (and its non-recurring services by September 30, 2006) and seek reimbursement from USAC by October 2006. The District’s FY 2006 and 2007 funding commitment requests are similarly positioned. Almost five (5) years later, in its February 2011 COMADs, the USAC attempts to rescind its approval of the District’s FY 2005, 2006 and 2006 funding commitments in the amount of approximately \$710,000 and to recover disbursed funds in the amount of approximately \$611,000 based on a fatally flawed factual analysis and unsupported legal standards.

process was in any way impacted by the payment of the expenses in question. Similarly, the notion that the District would accept Trillion's payment of several hundred dollars in expenses associated with attendance of a non-decision maker's attendance at an annual customer conference in each of the three FYs in question would affect the District's award of a multi-million dollar 5-year contract is just not logical. Thus, the timing, amount and circumstances of the expenses involved, particularly relative to the competitive bidding process, the value of the contract at issue and the nature of the conferences (as described earlier) argue strongly that the purpose of the "fair and open" competitive bidding policy would not be frustrated and that the public interest would be furthered by a waiver.

Also, basic principles of equity weigh in the District's favor. As stated above, the record demonstrates that the bidding process for the 2003 Contract was not affected in any way by the receipt of any benefits. It appears that USAC has interpreted the Commission's pre-existing "fair and open" competitive bidding process requirement in light of the Commission's subsequently-adopted new gift rules to create a *per se* violation of the "fair and open" requirement any time that any benefit was received during a contractual relationship regardless of the monetary value or temporal proximity to the bidding period or the lack of evidence indicating a link between the benefits and an adverse effect on a competitive bidding process.⁸⁹ Yet, the Commission neither approved nor applied such a standard during the bidding period for the 2003 Contract or the five-year duration of the District's contractual relationship with Trillion. To require the District to repay more than \$611,000 in already made disbursements based on the retroactive application of a standard which was not in effect at any time relevant to the actions at

⁸⁹ In this regard, the USAC's interpretation is actually stricter than the Commission's now-applicable "gift rules" (in that the Commission's recently-adopted rules provide notice and bright-line monetary thresholds).

issue and of which the District had no notice is inequitable and contrary to basic principles of fairness and due process.

In sum, the District acknowledges that both the Commission and the public have an interest in ensuring that public funds are dispensed fairly and efficiently, without waste, fraud or abuse, and that open and fair bidding promotes this interest. Yet, enforcing USAC's interpretation of the Commission's rules in this case does not further that interest because the 2003 Contract between the District and Trillion was the result of a fair and open bidding process that complied with the Commission's rules. Further, enforcing USAC's COMADs, which result in the District repaying substantial funds that it received up to five years ago, presents a hardship to the District, is inequitable and runs contrary to the public's interest in promoting and funding the spread of technological advances in its schools.

VI. CONCLUSION

The Charlotte County School District has been and continues to be very proud of the good work that it has done in coordinating the delivery of advanced technology services to its K through 12 schools and students and doing so in compliance with USAC program rules and guidelines. For the reasons explained above, the District urges the FCC to grant its Request for Review of the COMADs in this case by reversing the denials of the subject funding commitments and the related recovery of disbursed funds.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Richard Rubin', is written over a horizontal line.

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